

**(1994) 09 MAD CK 0081**

**In the Madras High Court**

**Case No :** Criminal Miscellaneous Petition No. 1797 of 1993 in Criminal Appeal  
No. 169 of 1993

Muruganandam

APPELLANT

Vs

State, by Assistant Commissioner of Police (Royapuram  
Range) N-2

RESPONDENT

**Date of Decision :** 02-09-1994

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 389

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 32A

**Citation :** (1995) 1 LW(Cri) 278

**Hon'ble Judges :** Jayarama Chouta, J;Arunachalam, J

**Bench :** Division Bench

**Advocate :** T.K. Sampath, for the Appellant; T. Sudanthiram, N. Ganapathy, G. Alager, M. Karpagavinayagam and B. Sriramulu, Public Prosecutor, for the Respondent

## Judgement

Arunachalam, J.—A learned Single Judge of this Court, by his order dated 29.7.93, in this petition, issued directions to the Registry, to put up these papers before the Honourable the Chief Justice for his orders, to place the matter before a Full Bench, to decide the point whether the High Court can or cannot, in view of Section 32-A of the Narcotic Drugs and Psychotropic Substances Act, suspend the sentence awarded in this case u/s 21 of the Act, in exercise of its power u/s 389, Code of Criminal Procedure and for further disposal of the petition.

2. The Honourable the Chief Justice, administratively observed, on 26.9.94, that a single Judge cannot refer a case to a Full Bench and therefore the order can be construed as one referred to a Division Bench. Accordingly, it was ordered, that this petition be placed before us for decision.

3. Meanwhile, the Bar Association, through its President, brought to the notice of the Honourable the Chief Justice, that suspensions of sentences, pending appeals, in cases arising out of the Narcotic Drugs and Psychotropic Substance

Act, were not being ordered in view of the decision of another single Judge of this Court in *Nagalingam v. Assistant Collector of Customs and Excise* (1993 L.W. (Crl.) 534) stating as hereunder:

By scanning and following the above case laws, I am able to identify that Courts of law have differed in their opinion in giving reasons for arriving at such conclusion, but however, they are all unanimous in the conclusion that no sentence awarded for the offences under the N.D.P.S. Act can be suspended, remitted or commuted during the pendency of the appeal or revision.

While so observing, the said learned Judge, was of the firm view, that reference, made by another learned single Judge, of this petition, for consideration of a Full Bench, was of no consequences.

The said request of the Bar Association was also placed before us, so that an authoritative pronouncement could be rendered by a Division Bench of this Court, on the feasibility of suspension of sentence, pending appeal, in convictions arising out of offences punishable under the Narcotic Drugs and Psychotropic Substances Act.

4. Even at the outset, we must plainly state, that two different Division Benches of this Court have taken the view, that Section 32A of the Act was not a bar for the High Court exercising its powers, in the matter of granting suspension of sentence and bail, pending disposal of appeal and that the powers of suspension u/s 389 of Code of Criminal Procedure stood preserved by Section 36-B of the Act. It was further stated by those Division Benches, that Section 32-A can refer only to the Government and not to Courts. It was also observed by both the Division Benches, that the limitations contained in Section 37 of the Act will have to be borne in mind by the High Court, while suspending the sentence and enlarging the accused on bail. In other words, the High Court will have to bear in mind the object of the Act and it should exercise its power with great care and caution so that the very object of the Act was not defeated. The verdict of the first Division Bench is available in *Oliver Fernando P. T. v. Assistant Collector of Madras* (1990 L.W.(Crl.3577) The Second Division Bench in *Kantilal Jain v. Asst. Collector, C.I.U. Madurai* (1991 L.W.(Crl.)563) , on the question, "Whether the provisions contained in Section 32-A of the Act is a bar for the High Court exercising its power in the matter of granting suspension of sentence and bail pending disposal of the appeal", stated, that they were in respectful agreement with the view expressed by the earlier Division Bench, to that question and that Section 32-A of the Act was not a bar for the High Court exercising its power in the matter of granting suspension of sentence and bail, pending disposal of an appeal and that powers of suspension u/s 389 of the Code of Criminal Procedure were preserved by Section 36-B, of the Act. They further stated that Section 32-A will refer only to the Government and not to the courts. It went on to add, that the powers of the High Court in the matter of granting suspension of sentence and bail pending disposal of an appeal, u/s 389 of the Code, are also subject to the restrictions contained in Section 37 of the Act.

5. It appears rather unfortunate, that when two different Division Benches of this Court, had verdict, that the High Court has power to suspend sentence and direct enlargement on bail, pending appeal, in respect of a person convicted under the Narcotic Drugs and Psychotropic Substances Act, it has been sought to be interpreted erroneously, by one learned Single Judge and the other had chosen to doubt the correctness of the decision rendered in *Oliver Fernando P.T. v. Assistant Collector of Madras* (1990 L.W.(Cr.) 357), in spite of the fact, that the rulings of the Division Benches; are binding on them. It will be now relevant to extract the observations of Chief Justice Gajendragadkar in *Shri Bhagwan and Another Vs. Ram Chand and Another*,

It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench, or in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper traditional way to deal with such matters and it is founded on healthy principles of Judicial decorum and propriety. It is to be regretted that the learned single judge departed from this traditional way in the present case and chose to examine the question himself.

Again, the observations of the Supreme court in *Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others*, need extraction:

one must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The Judicial decorum and legal propriety demand that where a learned single judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of Judicial Process not to follow this procedure.

It is a matter of regret that the learned Single Judges had embarked upon an enquiry and one of them chose to hold differently while the other, after expressing his view in detail, that one of the Division Benches was wrong, without making any purposeful reference to the judgment of the other Division Bench, had chosen to forward the papers to the Honourable the Chief Justice, for reference to a Full Bench. If the learned Single Judges had left it necessary, that the question involved needed reconsideration, that should have been done without embarking upon any enquiry, more so, when the legal issue involved, stood settled, by the decisions rendered by two Division Benches of this Court.

6. Counsel representing the Petitioner, learned Public Prosecutor, as well as counsel appearing *amicus curiae* in this matter, stated in unison, that the

question referred to us, has not been decided till now, by the Supreme Court. We have a few decisions of the other High Courts, some by learned Single Judges, a few by Division Benches and one by a Full Bench. We will refer to them in the course of our detailed discussion.

7. Narcotic Drugs and Psychotropic Substances Act 1985 (61 of 1985) was enacted on 16th September, 1985 to consolidate and amend the law relating to Narcotic Drugs and Psychotropic Substances and to make stringent provisions for the control and regulation of operations relating to those drugs and for the matters connected therewith. The Act was subsequently amended in 1989 and in the statement of Objects and Reasons, it has been stated as follows:

In recent years, India has been facing a problem of transit traffic in illicit drugs. The spillover from such traffic has caused problems of abuse and addiction. The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishments for drug trafficking offences. Even though the major offences are non-bailable, by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of Narcotic Drugs and Psychotropic Substances Act, 1985 the need to amend the law and to further strengthen it, has been felt.

It is under this amending process, that Section 32-A was inserted and Sections 36 and 36A to 36 D were substituted for Section 36, with effect from 29-5-89 by Act 2 of 1989. The relevance of insertion of Section 32A, bearing the heading that "No suspension, remission or commutation in sentence awarded under this Act", will have to be appreciated to conjunction with Section 36-B of the Act, preserving the powers of the High Court under certain Chapters of the Code of Criminal Procedure, which include Section 389 Cr.P.C., which deals with powers of suspension of sentence pending appeal and release of Appellant on bail. If the object of introduction of section 32-A was intended to take away the powers of suspension of sentences by the High Court, there was no need to provide such power to the High Court alone, u/s 36-B of the Act.

8. As has been noticed by the Division Bench in Oliver Fernanda's case (1990 L.W.(CrL.) 357) after defining the various terms in the act and defining powers of various authorities and officers, the Act enumerates offences and penalties in Sections 15, 39, 31. Section 31-A provides for death penalty for certain offences after previous conviction, while Section 32 of the Act provides for punishment for offences for which no punishment is provided. It is thereafter that Section 32-A has been placed in the Act by Act 2 of 1989. From Section 36 onwards, the Act deals with constitution of Special Courts, offences triable by Special Courts, appeal and revision, application of Code of Criminal Procedure before the Special Courts, transitional provisions, offences being cognizable and non-bailable offences by companies, power of Court to release certain offenders on probation, ending with Section 40 dealing with powers of court to publish names, place of business etc., of certain offenders. These sections also appear in Chapter IV of the Act.

9. Section 32-A of the Act reads as follows:

No suspension, remission or commutation in any sentence awarded under this Act:

Notwithstanding anything contained in the Code of Criminal Procedure., 1973 (2 of 1974) or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted.

This Section commences with a non obstante clause and provide that no sentence awarded under the Act, other than Section 27, shall be suspended, remitted or commuted. The section further makes a reference to provisions of Section 33 and adds, that subject to the provisions of that section, notwithstanding anything contained in the Code of Criminal Procedure, or any other law for the time being in force, no sentence awarded under the Act, other than Section 27 shall be suspended, remitted or commuted.

10. Since Section 33 of the Act, has been referred to in Section 32A of the Act, it will be necessary to extract Section 33 of the Act, which reads as follows:

Application of Section 360 of the Code of Criminal Procedure, 1973 and of the Probation of Offenders Act, 1958:

Nothing contained in Section 360 of the Code of Criminal Procedure, 1973 (2 of 1974) or in the Probation of Offenders Act, 1958 (20 of 1958) shall apply to a person convicted of an offence under this Act unless such person is under eighteen years of age or that the offence for which such person is convicted is punishable u/s 26 or Section 27.

Under this provision, unless a person was under eighteen years of age or the offence for which such person was convicted was punishable under Sections 26, or 27 of the Act, probation provisions cannot be invoked. In other words, an offender under the age of eighteen years or convicted u/s 26 or 27 of the Act, can be released on probation, either u/s 360 of the Code of Criminal Procedure, or by invoking the provisions, of probation of Offenders Act (20 of 1958). Though a category of offenders, could be dealt with, by utilising the provisions relating to probation, it does not necessarily mean, that the court which convicts such category of person, will have to necessarily invoke the "probation provisions", in respect of convictions recorded on those category of offenders. That is exactly the reason why, a reference has been made to Section 33, in Section 32-A of the Act. If u/s 33 of the Act, the convicting court chooses to apply the "probation provisions", that will be the end, for no sentence is awarded, and instead of sentencing that person at once to any punishment "probation provisions" stood invoked. On the contrary, in respect of those offences and the category of offenders contemplated u/s 33 of the Act, if a court chooses to impose a sentence after conviction, to that limited extent, suspension, remission or commutation of such sentence, will be permissible u/s 32-A of the Act.

11. At this stage, it will be relevant to refer to Section 39 of the Act, which relates to powers of Court, to release certain offenders on probation. We are referring to this section, since it will have to be read along with Section 33 of the Act. u/s 39(1), when an addict is found guilty u/s 27 of the Act, the court which finds him guilty, if it was of the opinion, regard being had to the age, character, antecedents or physical or mental condition of the offender, it was expedient so to do, notwithstanding anything contained in this Act, or any other law for the time being in force, instead of sentencing him at once to any imprisonment, with his consent, direct that he be released for undergoing medical treatment for detoxification or de-addiction, from a hospital or an institution, maintained or recognised by Government on execution of bond etc., for a period not exceeding one year and in the meantime abstain from the commission of any offence under Chapter IV. u/s 33 (2) of the Act, having regard to the report, regarding the result of the medical treatment., the court will have the power to release the offender, after admonition on band, for abstaining from the commission of any offence under Chapter IV during such period not exceeding three years and in the event of failure so to abstain, to appear and receive sentence when called upon. This provision also exhibits the object of the Act and the power of the Court under specified circumstances, not to sentence a particular category of offenders at once to any imprisonment, but deal with them differently. There cannot be a divergent opinion, that releasing on probation, after conviction, can only be done by Courts and not by any other agency.

12. Sections 34, 35, 36, 36-A, 36-B, 36-C, 36-D, 37, 38, 39 and 40 relate to the powers of Court and except Section 38, which relates to vicarious liability, in all other sections, the word "Court" has been used, be it with reference to Special Courts or the High Court. Though the word "Court" has not been used in Section 37 of the Act as well, that Section refers to the powers of the Court to release a person on bail only on the fulfilment of certain conditions. That Section 37 refers to Courts can never be a subject matter of controversy. However, Section 32-A, does not anywhere mention that the said section is applicable to Courts. This section uses the words "suspension, remission or commutation". Remission or commutation by Courts, have no recognition under the Code of Criminal Procedure. The Code of Criminal Procedure, while dealing with the powers of the appellate court u/s 386 Clause (b), states that the court, in appeal from conviction, can reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction subordinate to such appellate Court or commit him for trial, or alter the finding, maintaining the sentence, or with or without altering the finding, alter the nature and extent of the sentence, but not so as to enhance the same. The words used are not "remission or commutation of sentence". u/s 386(c) Code of Criminal Procedure in an appeal for enhancement of sentence, the appellate Court can reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or alter the finding while maintaining the sentence or with or without altering the finding, alter the

nature and extent of the sentence, so as to enhance or reduce the same. u/s 386(d), Code of Criminal Procedure in an appeal from any other order, the appellate Court can alter or reverse such order. Though the words "reduce the sentence or alter the nature and extent of the sentence" have been used, conspicuously, the words "remission or commutation" are absent, in the nature of powers exercisable by the appellate Court.

13. Similarly, u/s 401 of the Code of Criminal Procedure, dealing with High Court's powers of revision, discretion has been provided for exercise of any of the powers conferred on a Court of Appeal under Sections 386, 389, 390, and 391, or on a Court of Session by Section 307. Even under the revisional powers, the grant of remission or commutation does not arise. Contra distinguished with the powers of appeal and revision provided to Courts, Sections 432 and 433 of the Code of Criminal Procedure refer to powers of the Government to suspend, remit or commute sentences. Keeping aside for the moment, the word "suspend", the words "remit" and "commute" in relation to sentence, stand referred to the powers of the Government under the aforesaid two sections. Section 432 of the Code refers to any person, who has been sentenced to punishment for an offence. Again, u/s 433, the appropriate Government may, without the consent of the person sentenced, commute the sentence of death, for any other punishment provided by the Indian Penal Code, or commute a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine, or to commute a sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine, or commute a sentence of simple imprisonment, for fine. The powers of suspending, remitting and commuting sentences under these two sections stand vested only in the appropriate Government. The word "suspend" alone has been used with reference to Courts u/s 389, Code of Criminal Procedure. This power of suspension of sentence, is pending appeal, appended with release of the Appellant on bail. Naturally, if the sentence is one of fine, the question of releasing the Appellant on bail cannot arise, for then the sentence alone is capable of being suspended. The power u/s 389 Code of Criminal Procedure when a person is in confinement on conviction relates to a dual power of suspending the sentence, pending appeal, and releasing the Appellant on bail. Suspension of sentence u/s 432 Code of Criminal Procedure is an exclusive executive power, while u/s 389 Code of Criminal Procedure the power exercised by the appellate court, is totally judicial. A close look at Sections 432 and 433 of the Code of Criminal Procedure in conjunction with Section 32-A of the Act can only indicate that the general powers afforded to the Government to suspend, remit or commute sentences are sought to be restricted by the Special Act, u/s 32-A, leaving exercise of powers open, only in the arena, when a person stood convicted and sentenced u/s 27 of the Act, or he had not been dealt with under the provisions of Probation of Offenders Act or u/s 360, Code of Criminal Procedure by the convicting Court, in spite of the fact that such person was under eighteen years of age, or the offence for which such person, was convicted

was punishable u/s 26 or 27 of the Act. There cannot be a second opinion, that the provisions of the Special Act will exclude, to that extent the general power under the Code of Criminal Procedure. When no powers have been conferred upon Courts regarding remission or commutation, there can certainly be no scope for taking away those non-existent powers by putting in the statute book, Section 32-A.

14. In this context, it will be appropriate to extract the observations of the Division Bench on this aspect in Oliver Fernando's case (1990 L.W.(Cr.)357) :

Therefore, Section 32-A coming in the Scheme of the Act as noticed above can refer only to the provisions regarding punishment and it cannot refer to the power of the High Court to suspend the sentence after conviction. Apart from that, the language of the section itself shows that it cannot refer to the powers of the Court, since the High Court has no power to remit or commute the sentence which vests only with the Government under Sections 432 and 433 of the Code. The said Section is equivalent to Section 432 and 433 of the Code. u/s 432(1) of the Code the appropriate Government is given ample powers to suspend the execution of sentence or remit the whole or any part of the punishment to which any person has been sentenced to punishment of an offence. The other part of the section deals both the procedure for suspending or remitting the sentence. Section 433 of the Code confers on the Government to commute the sentence. These two powers do not vest with the Court and, therefore, the language of Section 32-A of the Act, which speaks of suspension, remission and commutation of sentence clearly shows that it refers only to the Government and not to the Court.

In Kantilal Jain's case (1991 L.W.(Cr.)563) , the following observations were made:

From the above discussion it emerges that Section 32-A is not a bar for the High Court exercising its powers in the matter of granting suspension of sentence and bail pending disposal of the appeal, inasmuch as the powers of suspension u/s 389 of the Code are preserved by Section 36-B of the Act and that Section 32-A will refer only to the Government and not to the Courts.

A learned single Judge of this Court, has observed as hereunder, in Velu Thevar v. State, represented by Inspector of Police, N.I.B.C.I.D. (1992 (2) Crimes 1058 1992 L.W.(Cr.)187) :

By a cursory look and glance of the said section, although it may appear that the section does empower the Court to grant suspension of sentence, it is not really so and the same will be patent if a little bit of further probe is made therefore. It may be recapitulated at this juncture that two specific provisions in the shape of Sections 432 and 433 had been enacted in the Code as respects suspension, remission and commutation of sentence. Those two sections recognise the power of the State Government to suspend, remit or commute the sentence of persons convicted of an offence and undergoing the incarceration in jail. It is with a view

to curtail the executive power of the Government in the matter of suspension, remission and commutation of sentence of persons convicted of an offence under this Act, a special provision u/s 32-A of the Act has been enacted by the introduction of a non obstante clause in the said section, namely, "Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)", obviously in a bid to make stringent provisions for the control and regulation of operations relating to Narcotic Drugs and Psychotropic Substances. As such, there is no express exclusion of the power of this Court in the matter of suspension of sentence of offenders convicted of offence, which had been recognised u/s 389 of the Code.

In *Gyan Chand Vs. The State of Rajasthan*, B.R. Arora, J., of Rajasthan High Court, stated that, "The powers of the High Court regarding suspension of sentence u/s 389 Cr.P.C., are thus not curtailed by Section 32-A of the Act, rather Section 32-A of the Act does not deal with the Power of the appropriate Government only and has no connection, whatsoever, so far as the Judicial powers of the High Court are concerned. The Legislature by enacting Section 32-A of the Act never intended to take away the judicial powers and the discretion of the High Court regarding suspension of sentence and, in fact, has taken away the executive power of the State, of suspension, remission or commutation.

15. In *Phasalu v. State of Kerala* (1992 (1) Cri 300), Padmanabhan, J. of that Court, held that Section 32-A of the Narcotic Drugs and Psychotropic Substances Act was not meant to curtail the powers of the High Court to suspend the sentence pending appeal, but for considering suspension of sentence and grant of bail u/s 389, Cr.P.C., in an appeal against conviction and sentence, provisions u/s 37 of the Act cannot be ignored, Padmanabhan J., had to express his opinion, on a reference, since Pareed Pillay, J. stated that Section 32-A stood in the way of suspending a sentence and granting bail, while Balakrishnan, J., observed that Section 32-A was not applicable to the High Court and it affected only the powers of the Government under Sections 432 and 433 of the Code of Criminal Procedure. Padmanabhan J., stated as follows:

Section 432 and 433 of the Criminal Procedure in Chapter XXXIII deal with the powers of suspension, remission and commutation of sentences by the Government. Those provisions alone were intended to be affected by Section 32-A. That is clear from the wording of Section 32-A which says that no sentence awarded under the Act other than u/s 27 shall be suspended or remitted or commuted, if that provision is interpreted as taking away the powers of the High Court what will be affected is the power of judicial review of the sentence in appeal or revision because so far as the High Court is concerned interference with the sentence is possible only judicially. It will be abused to think that the legislature by Section 32-A wanted to take away the judicial powers and discretion of the High Court to interfere with the sentence. If such an interpretation is accepted, there will be no meaning in an appeal to High Court which can interfere with the sentence only judicially ... It is therefore clear that

what the legislature meant by Section 32-A was that the Government should not be allowed to exercise its powers of suspension, commutation and revision u/s 27 which is comparatively minor. What the legislature wanted in view of the seriousness of the offence is that in public interest Government should not exercise these rights judicial review is not in any way affected by Section 32-A.

16. The judgment of the Division Bench in Phasalu v. State of Kerala is reported in 1992(1) Cri 295. Pareed Pillai J., has observed therein as hereunder:

From a reading of Section 32-A of the N.D.P.S., Act it is not possible to hold that the interdict regarding suspension of the sentence is confined only to the Government and not to the appellate court. The section does not confine its ambit to the suspension of sentence by the Government. The section does not make any distinction between the suspension of sentence by the appellate court and the Government. Of course, appellate court's power of suspension of sentence is limited to a case where the convicted accused has filed appeal. Suspension of sentence by the appellate Court can only be till the appeal is disposed of whereas suspension of sentence by the Government is not thus limited. Except that difference, Section 32-A does not indicate of any difference regarding suspension of sentence by the appellate Court of the Government. The argument that Section 32-A has no application to the power of the appellate Court regarding suspension of sentence cannot be accepted. It is the well settled legal principle that words, phrases and sentence of a statute should ordinarily be understood in their natural, ordinary, popular and grammatical meaning unless it would lead to an absurd result or the subject of the statute indicates a totally different meaning. Even if two interpretations are possible, the one which fits in with the object of the statute has to be adopted. As held by Supreme Court in Vijayawada Municipal Council Vs. Andhra Pradesh State Electricity Board and Another, the salutary rule of construction rests upon the doctrine that a statute like any other document, must be read as a whole to extract its meaning and intendment correctly. If Section 32-A is held applicable only to suspension of sentence by the Government, it would lead to a ridiculous and anomalous position. Thus, where a person is accused of an offence under the Act, Section 37 makes the provision for the grant of bail very arduous whereas when a person is convicted, he would not face that much difficulty in getting bail. While interpreting a section, it is elementary that it should be considered in the backdrop of the entire statute and a particular section cannot be read in isolation. Section 32A interdicts suspension of the sentence and as no differentiation is made with regard to that power to be exercised either by the Government or the Court, the argument that the Court is vested with the power to suspend the sentence and the section has no application cannot be sustained.

As Section 32-A of the N.D.P.S. Act envisages that notwithstanding anything contained in the Code of Criminal Procedure or any other laws for the time being in force, sentence cannot be suspended and as it applies equally to the appellate court, there is no merit in the contention of the Petitioner that the appellate

Court has unfettered power to suspend the sentence pending appeal. Even though Section 36-B of the Act provides that the High Court has all powers under Chapters XXIX and XXX of the Cr.P.C., Section 32-A of the N.D.P.S. Act makes the position manifestly clear that the High Court has no jurisdiction to suspend the sentence. It therefore follows that the High Court is not clothed with power under N.D.P.S. Act to suspend sentence awarded under the Act except u/s 27. In the result, the petitions are dismissed." On the contrary, Balakrishnan, J., had the following observations to make:

Section 32-A also is not intended to curtail the powers of the High Court u/s 389 of the Code, Section 32-A is to abrogate the powers of the Central or, State Government vested in them u/s 432 and 433 of the Code of Criminal Procedure, 1973. That is evident from the words used in Section 32A of the Act. Under Sections 432 and 433 of the Code powers are conferred on the appropriate Governments to suspend or remit sentences. Similar powers are not conferred on the High Court. u/s 386 of the Code the power of the appellate Court in an appeal from conviction include only reversing the finding and sentence, acquit or discharge the accused or order him to be tried by a court of competent jurisdiction subordinate to such appellate court or alter the finding and maintaining the sentence or without altering the finding alter the nature and extent of the sentence, but not to enhance the same. There is no power of suspension, remission or commutation as such conferred on the High Court, except to suspend the sentence temporarily pending appeal as postulated u/s 389 of the Code.

17, Since there was a clear cleavage of opinions between two learned Judges of the Kerala High Court regarding interpretation of Section 32-A of the Narcotic Drugs and Psychotropic Substances Act, that question, was placed before a Full Bench of that Court, after some times and drifts. If the two questions posed before the Full Bench in *Berlin Joseph @ Ravi v. State* (1992 (1) Cri 1221), the question now we are concerned was posed therein as follows:

Whether the High Court can suspend the sentence passed on an accused convicted of an offence under NDPS Act during pendency of his appeal before the High Court.

In answer to the said question, the Full Bench stated that they were in agreement with the view adopted by Pareed Pillay, J. in *Phasalu v. State of Kerala* (1991(2) KLT 787: 1992 (1) Cri 295) , that application of Section 32-A cannot be confined to governmental powers and it applied to suspension of sentence during the pendency of appeal also. High Court had no power to suspend the sentence of a convicted person either during the pendency of appeal or revision, unless it related to the offence u/s 27. While so answering this question, the Full Bench chose to make a reference to Articles 72 and 161 of the Constitution in relation to the power of the President of India or the Governor of a State to suspend, remit or commute sentences in all cases where punishment or sentence is for an offence against any law relating to a matter to which executive power of the

Union extended or in relation to a person convicted of any offence against law relating to a matter to which the executive power of the State extended, and then stated that if the object of Section 32-A of the Narcotic Drugs and Psychotropic Substances Act was to take away the power of the Government to suspend, remit or commute, the legislative exercise, in enacting the said provision, is practically of futility, because even without Sections 432 and 433 of the Code, the appropriate Government can suspend, remit or commute sentences, in exercise of the Constitutional functions. Therefore, the Full Bench was not firstly impressed by the contention, that the sole object of incorporating a provision like Section 32-A in the Narcotic Drugs and Psychotropic Substances Act was to impose curb on the executive power to suspend, remit or commute the sentence passed on a particular accused. Nextly, it observed that if legislative intent in enacting Section 32-A of the Narcotic Drugs and Psychotropic Substances Act was only to curb the governmental powers under Sections 432 and 433 of the Code, clear and necessary words in Section 32-A would have been conveniently employed in the provision, instead of saying "notwithstanding anything contained in the Code". The Full Bench felt that in such an event, Section 32-A would have been worded "notwithstanding anything contained in Chapter XXXII of the Code". Again, the Full Bench stated, that the words "or any other law for the time being in force" in Section 32-A would further show that the sole aim of the provision is not to fetter exclusively the power envisaged in Section 432 and 433 of the Code. The Full Bench then chose to make a reference to Section 36-B of the Act and observed that it must be borne in mind that the Section had advisedly used the rider words "so far as it is applicable" in order to indicate that the section was not intended to invoke all the powers envisaged in the Chapter hook, line and sinker. It went on to add, that if that part of Section 389 of the Code which dealt with the discretion of the High Court to suspend the sentence was not applicable, then Section 36-A of the NDPS Act was not a carte blanche to exercise all powers conferred on the appellate Court by virtue of Chapter XXIX of the Code. Then, the Full Bench had taken into account "objects and Reasons" to which the legislative intent, and stated that it helped to discern that Section 32-A was intended to provide an embargo against suspension, remission and commutation of sentence of a convicted person, whether it was during the pendency of appeal or otherwise.

18. With great respect, we are unable to agree with the view expressed by the Full Bench of the Kerala High Court. The said Full Bench had omitted to notice that the words "remission and commutation" have not been used in the Code of Criminal Procedure in respect of Courts. Further, the observations of the Full Bench, that if the object of Section 32-A of the NDPS Act was to take away the power of the Government to suspend, remit or commute the sentence, the legislative exercise in enacting the said provision was practically of futility, because even without Sections 432 and 433 of the Code, the appropriate Government can suspend, remit or commute sentence in exercise of the Constitutional functions, overlook the observations of the Supreme Court in Maru

Ram and Others Vs. Union of India (UOI) and Others, which read as hereunder:

The present provisions (Section 432 and 433) have verbal verisimilitude and close kinship with the earlier Code of 1898 (Section 401 and 402): Likewise, the Constitutional provisions of today were found even in the Government of India Act, 1935. Of Course, in English constitutional law, the sovereign, acting through the Home Secretary, exercise the prerogative of mercy. While the content of the power is the same even under our Constitution, its source and strength and, therefore its functional features and accountability are different..... Suffice it to say that Articles 72 and 161 are traceable to Section 295 of the Government of India Act, 1935..... It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are co-extensive. But two things may be similar, but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and obviously, the constitutional power is "untouchable" and unapproachable and cannot suffer the vicissitudes of simple legislative processes..... We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution, but a separate, though similar, power and Section 433-A by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power pardon, commute and the like.

We are unable to agree with the view expressed by the Full Bench of the Kerala High Court, that the usage of words," or any other law for the time being in force" in Section 32-A of the Act, would further show that the sole aim of the provision, was not to fetter exclusively the power envisaged in Sections 432 and 433 of the Code. It is fairly apparent, that it was the intention of the legislature keeping in tune with the object and purpose of the Act, not to allow the Government to use its power haphazardly under Sections 432 and 433 of the Code of Criminal Procedure, or similar such power, more so, when the drug menace was assuming a high proportion in the Commission of serious offences (sic).

19. A single Judge of the Madhya Pradesh Court in *Giriraj v. State of M. P.* (1993(1) Cri 889) took the view, that except for conviction for an offence punishable u/s 27 of the Narcotic Drugs and Psychotropic Substances Act, no suspension of sentence for conviction under other sections can be made u/s 389, Code of Criminal Procedure. The learned Judge stated that unlike Sections 432, 433, 434 and 435 which refer to the Government, such reference to Government was absent in Section 32-A of the Act and therefore the said provision would be applicable to a Court and except for conviction for offence u/s 27, no suspension of sentence for conviction under other sections could be ordered. Learned Judge has referred to the Division Bench judgment of this Court in *Kantilal Jain and*

Ors. v. Assistant Collector, C.I.U. Madurai (1991 I.L.W (Crl) 563) as well the judgment of the Supreme Court in Narcotics Control Bureau Vs. Kishan Lal and others, We must state at this juncture, that the Supreme Court had no occasion to consider the impact of Section 32-A of the Act and Section 36-B of the Act in Narcotics Control Bureau Vs. Kishan Lal and others, . All that the Supreme Court has stated therein is that the power of the High Court u/s 439 of the Code to bail, was subject to limitations u/s 37 of the Act. The learned Judge drew strength for his view from the decision of the Full Bench of the Kerala High Court in Berlin Joseph @ Ravi v. State (1992(1) Cri 1221). However, the learned single Judge had referred the matter for decision by a Division Bench of that Court, for resolving the difference between him and another single Judge of the same court. No light has been thrown before us, if any Division Bench of Madhya Pradesh High Court had offered its view on the scope of Section 32-A of the Narcotic Drugs and Psychotropic Substances Act.

20. A Division Bench of the Gujarat High Court in Ishwar Singh M. Rajput v. State of Gujarat (1991(2) Cri 160) , while considering the scope for release of a person convicted under the Narcotic Drugs and Psychotropic Substances Act, on parole, after making a reference to Section 32-A of the Act, as well the Objects and Reasons of the enactment, stated as follows:

It is abundantly clear that Section 32-A and other sections are added inter alia to provide that the drug offenders may not be released on bail, punishment to the offenders is deterrent and to make provision that no sentence awarded under the Act shall be suspended, remitted or commuted.

The Gujarat High Court went on to add, that the object of the Parliament would be frustrated, if the prisoners under the Narcotic Drugs Act were to be released on parole or furlough.

21. A Division Bench of Karnataka High Court in Dondusa Nemasa Baddi Vs. State of Karnataka, , while considering the scope and ambit of the Act vis-a-vis bail pending appeal for persons convicted under the Act, stated as follows:

If the scope and ambit of N.D.P.S. Act are considered the provisions therein are intended to protect persons from free and unbridled possession and use of such narcotic drugs which, of late, have assumed a very dangerous proportion in social life. Charas, opium and ganja which are sought to be controlled under the N.D.P.S.

Act are found in large circulation in the Society thus impairing the very health and orderly living in society. The trial Court has found that the Appellant was in actual possession of these narcotic drugs and it is for this Court to consider on merits if there is no sufficient evidence to maintain the findings of the trial court.

At this stage keeping in view the seriousness of the offences found committed by the Appellant including possession of arms and ammunition in large quantity unlawfully it would be rather hazardous to grant bail to the Petitioner.

These are general observations made by the Karnataka High Court without reference to Section 32-A or Section 36-B of the Act. The said Division Bench was considering on merits the scope for suspending sentence and releasing that particular Appellant on bail, pending appeal, based on the conspectus of facts placed before them. No principle of law appears to have been laid down by the Division Bench of Karnataka High Court.

22. Now that the entire law on the subject has been noticed by us, we have no hesitation in reiterating that the view expressed by two earlier Division Benches of this Court in Oliver Fernando's case (1990 L.W. (Crl.) 357) and in Kantilal Jain's case (1991 L.W.(Crl.)563) , that Section 32-A of the Narcotic Drugs and Psychotropic Substances Act, in view of its placement in the scheme of the Act, can refer only to the provisions regarding punishment and cannot refer to the power of the High Court to suspend the sentence after conviction and that the language of the section itself shows, that it cannot refer to the powers of Court, since the High Court has no power to remit or commute the sentence, which is vested only with the Government under Sections 432 and 433 of the Code of Criminal Procedure and further, in view of the language of Section 32-A of the Act, which relates to suspension, remission and commutation of sentence, it can refer only to the Government and not to the Courts.

23. Having arrived at a definite conclusion that Section 32-A of the Act, does not bar the power of the Court, to suspend any sentence awarded under the Act, we will have to now refer to Section 36-B of the Act, the provisions wherein, tend to affirm our view Section 36-B of the Act reads as hereunder:

36-B Appeal and revision --The High Court may exercise, so far as may be applicable, all the powers conferred by chapters XXIX and XXX of the Code of Criminal Procedure, 1973 (2 of 1974) on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court where a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

We have already noticed that Section 36-B came into the statute book alongwith Section 32-A of the Act with effect from 20.5.1989. These two sections which appear in the same Act and which have been brought into effect on the same day, apparently exhibit repugnance. If Section 32- A will have to be held to apply to Courts as well, suspension of sentence gets barred, and if that was the intention, there was no need to introduce Section 36-B of the Act, preserving the powers of the High Court to suspend sentence u/s 389, Code of Criminal Procedure and consequentially release the Appellant concerned on bail. If it were to be held that Section 32-A of the Act will not be applicable to Courts, but would only relate to Governmental power, then repugnance between Section 32-A and 36-B will cease to exist. On the contrary, if these two sections will have to be held to be repugnant, then efforts should be made to reconcile these two provisions. If reconciliation stands defied, effect should be given to both the provisions and a harmonious construction will have to be adopted.

24. In Maxwell's "Interpretation of Statutes", 12th edition at page 239, under the heading "Strict construction of Penal laws", it has been stated as hereunder:

The principle applied in construing a penal Act is that if, in construing the relevant provisions, there appears any reasonable doubt or ambiguity, it will be resolved in favour of the person who would be liable to the penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case", said Lord Esher M.R., "we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal section.

In Gyan Chand Vs. The State of Rajasthan, the learned single Judge, after quoting Maxwell on the rule of statutory co-existence, which reads as follows,

It is sometimes found that the conflict of two statutes is apparent only, as their objects are different and the language of each is to be restricted to its own object or subject. When their language is so confined they run in parallel lines without meeting" posed a question whether both the provisions can co-exist or not and ultimately answered that "even on this statutory rule of interpretation, powers u/s 389, Code of Criminal Procedure of the appellate Court regarding suspension of sentence have been preserved by Section 36-B of the Act, as it appears, that Section 32-A of the Act and both the provisions were enacted together. "while doing so, learned Judge stated, that even as per rule of statutory construction, if two sections of the statute were repugnant in any way to the first, the latter provision will prevail, for it stands last in the enactment and speaks the last intention of the makers. The learned Judge went on to add, that if both the provisions are harmonised, there may not be any conflict between them, for Section 36-B of the Act deals with the power of appellate Court for suspension of sentences passed by the Court below during pendency of appeal, while Section 32-A of the Act imposes a restriction on the powers of the appropriate Government, regarding suspension, remission or commutation after conviction. The executive powers were taken away, while preserving judicial powers of the appellate Court. The earlier Division Benches of this Court in Oliver Fernando's case (1990 L.W. CrI.357) and Kantilal Jain's case (1991 L.W. CrI. 563) have clearly held, that Section 36-B of the Act, in categorical terms, preserves exercise of power by the High Court, so far as may be applicable, to all the powers conferred by Chapters XXIX and XXX of the Code. The language is couched in such manner so as to exclude any limitation on such power. Though the Division Benches stated, that it was significant to note that the power of the High Court to suspend sentences stood provided u/s 389 of the Code of Criminal Procedure, which fell under Chapter XXIX, the Division Bench went on to add, that the Parliament in its wisdom had chosen to leave the powers of the High Court to suspend sentences unaffected by providing Section 36-B of the Act. If the framers of the Act had intended to restrict the powers of the High Court to suspend sentence after conviction, they would have certainly made a specific provision to that effect. The first Division Bench has also referred to the repeated

observations of the Supreme Court that exclusion of jurisdiction cannot be inferred and that a statute ousting the jurisdiction of a Court must be strictly construed. The said Division Bench hastened to add that the limitations contained in Section 37 of the Act will have to be borne in mind by the High Court, while suspending the sentence and enlarging the accused on bail. In view of the object of the Act, such exercise of powers must be with great care and caution so that the very object of the Act, was not defeated. One of us (Arunachalam. J) who was a party to the said judgment, appended his own reasons, a part of which may need extraction:

This section specifically refers to Chapters XXIX and XXX of the Code of Criminal Procedure, Chapter XXIX of the Code refers to appeals to various Courts inclusive of the Supreme Court, High Court and the Court of Session. Chapter XXX deals with reference and revision. Even this Chapter embraces the powers of the High Court and the Court of Session. Since these two chapters take within their fold Courts other than the High Courts also, the words "so far as may be applicable" have been used in this Section. In other words, it means that the High Court may exercise the Powers conferred by Chapters XXIX and XXX of the Code so far as may be applicable to it, thereby excluding the other provisions in these Chapters, which deal with powers of Courts other than the High Court.

We are in agreement with the first Division Bench in its interpretation of the words "so far as may be applicable" found in Section 36-B of the Act.

25. The learned referring Judge, after extracting Section 32-A of the Act, has stated that the power of the High Court to suspend the sentence stood derived either from the provisions of the Code of Criminal Procedure or it may get that power under any other law. When such power stood curtailed by the use of the words "notwithstanding anything contained in the Code of Criminal Procedure, 1973, or any other law for the time being in force", (the opening words in Section 32-A), it sounded odd that the Division Bench had still chosen to say that Section 32-A did not affect the power of the High Court to suspend the sentence u/s 389, Code of Criminal Procedure We have given enough reasons and more, as to why Section 32-A and Section 36-B operate in two totally different fields and to more vocabulary will be needed to confirm the fairly apparent legal interpretation.

26. Learned referring Judge, then chose to extract Section 36-B of the Act and stated that one should not lose sight of the restrictive words "so far as may be applicable" employed in Section 36-B. In that context, learned Judge stated, that it must be noted that Sec. 32-A which occurred earlier to Section 36-B was to the effect that the sentence cannot be suspended under the provisions of Code of Criminal Procedure or any other law for the time being in force, more so, when there was nothing whatsoever to indicate that the said section related only to governmental power and not to the power of the High Court. In the opinion of the learned referring Judge, it was quite understandable that because the Legislature took away the power of the High Court to suspend the sentence u/s

32-A, when they enacted the subsequent Section 36-B, they have stated that the High Court may exercise its powers under Chapter XXIX so far as may be applicable, meaning thereby that the High Court can exercise all its powers under Chapter XXIX, except its power of suspension of sentence. Learned Judge appears to have overlooked that in Section 36-B, not only chapter XXIX of the Code of Criminal Procedure has been mentioned, but it takes in its fold Chapter XXX of the Code as well. As we have already stated, these Chapters refer not only to the High Court, but to the Courts of Session as well the Supreme Court. If the powers of suspension alone was sought to be excluded by Section 36-B of the Act, the legislature could have easily stated that except powers of suspension, all the powers under Chapters XXIX and XXX could be exercised by the High Court. It is in that context, the relevance of the words "so far as may be applicable" will have to be appreciated. Learned referring Judge appears to have misconstrued the scope of Section 32-A, since the said section reads that subject to the provisions of Section 33, no sentence awarded under this Act other than Section 27, shall be suspended, remitted or commuted. We have already given our reasons, as to how mention of Section 33 of the Act, as part of Section 32-A, cannot lead to the conclusion that Section 32-A, cannot to courts and not to governmental powers. Learned referring Judge has virtually founded his conclusions on the basis of the decision of the Kerala High Court in *Berlin Joseph v. State* (1992(2) Cri 353) , which, as we have stated earlier, had not considered, that in the Code of Criminal Procedure, the words "remission and commutation" had not been used in relation to powers of Courts.

27. The second Division Bench in *Kantilal Jain v. Assistant Collector, C.I.U., Madurai* (1991 L.W(Crl.563) stated that powers of the High Court in the matter of granting suspension of sentence and bail pending disposal of an appeal, were preserved by Section 36-B of the Act and Section 32-A of the Act was not a bar for the High Court exercising such powers. The second Division Bench further noticed that this legal position relating to granting suspension of sentence and bail pending disposal of appeal by the High Court u/s 389 of the Code, was not affected by the decision of the Supreme Court in *Narcotics Control Bureau v. Kishnan Lal and Ors.* (1991 L.W. (Crl.) 53 S.C.). The other decisions, which we have referred to earlier which hold that Section 32-A does not curtail the powers of the High Court, have adopted a similar interpretation of Section 36-B of the Act, which, in their opinion, preserved the powers of the High Court in relation to suspending of sentence and granting bail, pending appeal, by a person convicted under the Act. We cannot overlook that Section 389 of the Code of Criminal Procedure not only refers to suspension of the execution of sentence or order appealed against, but also takes in its fold release on bail of the Appellant, if he was in confinement. The legislature has, therefore, made it clear that all the powers of the High Court under the specified chapters in relation to suspending of sentence and granting bail, stood preserved.

28. *Janarthanam.J. in Velu Thevar v. State*, represented by the Inspector of Police, N.I.B.C.I.D. Theni (1992 L.W. (Crl.) 187) while holding that there was no

express exclusion of the power of the High Court in the matter of suspension of sentence of a person convicted for an offence, which has been recognised u/s 389 of the Code, added that it has to be borne in mind that simply because the power of this Court u/s 439 of the Code stood preserved, it did not mean that such a power can be exercised de hors stringent provisions contained in Section 37 of the Act regulating the grant of bail to offenders accused of offences under the Act inasmuch as suspension of sentence of offenders convicted under the Act pending appeal, involved grant of bail. Learned Judge has relevantly referred to Sub-section (3) of Section 36-A of the Act, which preserves the power of the High Court in the matter of granting bail then, the learned Judge stated that it was clear from the law stated by the Supreme Court in *Narcotics Control, Bureau v. Krishan Lal and Ors.* (1991 L.W.(Crl) 53 (SC) that the power of this Court u/s 439 of the Code in the matter of grant of bail to persons accused of offences under this Act, was subject to limitations that have been provided for u/s 37 of the Act. In conclusion, the learned Judge stated as hereunder:

It is to be remembered that the materials available as against a person accused of an offence under this Act prior to and during the stage of trial can, in the eye of law, be construed as prima facie materials capable of proving the alleged commission of the offence during trial. After the stage of trial such materials get sanctified as evidence proving the commission of the offence by the offenders till their conviction and sentence are set aside on appeal. In such state of affairs, it cannot be stated that there are reasonable grounds, at the stage of consideration of suspension of sentence pending appeal, for coming to the conclusion that he is not guilty of the offence in respect of which he had been convicted and sentenced, leave alone the other ground that he is not likely to commit any offence while on such bail.

The above observations were brought to our notice by the defending counsel, who then submitted that existence of power, without scope for usage of such power, can only be a dead-letter and that could not have been intended by the legislature. This argument cannot be lightly brushed aside and we will advert to it a little later. The Full Bench of the Kerala High Court in *Berlin Joseph @ Ravi v. State* (1992 (1) Cri 1221) , as stated earlier, while conceding that Section 36-B, no doubt empowered the High Court to exercise powers envisaged in Chapter XXIX of the Code, held that it must be borne in mind that the section has advisedly used the rider words "so far as it is applicable" in order to indicate that the Section was not intended to invoke all the powers envisaged in that Chapter lock, stock and barrel. We have already expressed our disagreement.

29. We hold that the two earlier Division Benches of this Court in *Oliver Fernanda's case* (1990 L.W. (Crl. 357) and *Kantilal Jain's case* (1991 L.W. (Crl. 563) have laid down the correct law, on a harmonious reading of Section 32-A and Section 36-B of the Act and nothing relevant has been placed before us, even to remotely make an impression, that the said view requires any reconsideration.

30. At this stage we are bound to refer to the judgment of another single Judge of this Court in *Nagalingam v. Assistant Collector of Customs and Excise* (1993 L.W. (CrL.)534). After extracting correctly the law laid down by a Division Bench of this Court in *Kantilal Jain's case* (1991 L.W.(CrL.)563), the learned Judge has observed as hereunder:

Thus, a plain reading of the decision rendered by the Division Bench of this Court stated *supra*, makes it abundantly clear that the power of the High Court to suspend the sentence imposed upon an accused and grant bail during the pendency of the appeal preferred by him is restricted by virtue of Section 37 of the N.D.P.S. Act and that therefore, during the pendency of the appeal, no sentence awarded under the N.D.P.S. Act can be suspended and bail granted. If the cumulative effect of the decisions rendered by the Full Bench of the Kerala High Court and the Division Bench of this Court stated *supra* are juxtaposed, it is made clear that during the pendency of an appeal, filed canvassing against the judgment of conviction and sentence passed under the N.D.P.S. Act, the sentence cannot be suspended and no bail can be granted and that was the consensus of law held by both courts, however, on different reasonings.

We are not in a position to agree, with the aforestated observation that the second Division Bench of this Court had made it clear, that during the pendency of an appeal filed canvassing against the judgment of conviction and sentence passed under the Narcotic Drugs and Psychotropic Substances Act, the sentence cannot be suspended and no bail can be granted and further that was the consensus of law held by both the Courts, (Kerala and Madras), however, on different reasoning. Both the Division Benches of this Court had a divergent view of the powers of this Court, preserved u/s 36-B of the Act, to suspend sentence and enlarge on bail a person.....convicted under the Narcotic Drugs and Psychotropic Substances Act pending decision in his appeal. The second Division Bench, after referring to the law laid down by the Supreme Court in *Narcotics Control Bureau v. Kishanlal and Ors.* (1991 L.W. (CrL.)53 (SC), had only stated that question No. 1 decided by the first Division Bench in respect of applicability of Section 37 of the Act to the High Court, could no longer be held to be good law but categorically, stated, that they were in agreement with the opinion expressed by the said Division Bench on the second question which is the very question involved in the instant reference. They have further stated that the answer to the second question by the earlier Division Bench was not affected by the decision of the Supreme Court in *Narcotics Control Bureau v. Kishanlal and Ors.* (1991 L.W. (CrL.) 53 (SC). In paragraph 13 of his judgment, in *Nagalingam v. Assistant Collector of Customs and Excise* (1993 L.W.(CrL.)534) learned single Judge has chosen to make the following observations:

In this context, however the reasonings given by the Full Bench of the Kerala High Court and the Division Bench of this Court as above referred in the context of the clear finding given by a single Judge of this Court, it has to be seen that courts of law in all the above cases, are unanimous in their conclusion that

during the pendency of appeal or revision preferred against the conviction of an accused for the offences under the N.D.P.S. Act no sentence of imprisonment can be suspended, remitted or commuted for the reason of the total embargo provided either by Section 37 of the N.D.P.S. Act or Section 32-A of the said Act. By scanning and following the above case laws, I am able to identify that courts of law have differed on their opinion in giving reasons for arriving at such conclusion but however, they are all unanimous in the conclusion that no sentence awarded for the offences under the N.D.P.S. Act can be suspended, remitted or commuted during the pendency of the appeal or revision. Therefore, in this context, I am of the firm view, that the reference made by my learned brother Bellie, J., for the consideration of the Full Bench is of no consequence in following the same line as enunciated by the case laws above quoted.

It is apparent that the learned single Judge has not only misread the judgment of the Division Bench in Kantilal Jain's case (1991 L.W.(CrL.) 563), but has also misread the view expressed by Janarthanam J. in Velu Thevar's case (1992 L.W. (CrL.)187) Janarthanam J. has definitely stated that the power of this Court in the matter of suspension of sentence of offenders convicted for an offence, was not expressly excluded, though it has to be borne in mind that such a power cannot be exercised de hors stringent provisions contained in Section 37 of the Act, regulating grant of bail to offenders, inasmuch as suspension of sentence of offenders convicted under the Act pending appeal involved grant of bail.

31. The stage has now reached to have a quick look at some more decisions. Before doing so, it will be necessary to refer to the argument of some of the counsel who have urged before us that provisions of Section 37 of the Act will not be applicable to every person other than those accused of an offence punishable for a term of imprisonment of minimum of five years or more, placing reliance upon the words in Section 37(1)(b) of the Act that no person accused of an offence punishable for a term of imprisonment of five years or more under this act shall be released on bail or on his own bond unless conditions (i) and (ii) were satisfied.

32. We are able to comprehend that in spite of an appeal being a continuation of a trial there is an apparent distinction between a person accused of an offence and a person convicted of an offence. In *Jairam Das v. Emperor* (AIR.1945 Privy Council 94) , the Privy Council stated as follows:

The only granting of bail which is referred to in that chapter (which consists of Sections 496 to 502 inclusive) is the grant of bail to accused person. There is no reference therein to the granting of bail to persons who have been tried and convicted. It is true that in the Indian Decisions, Section 498 seems to have been treated as though it included cases in which person already convicted were concerned; but any such view seems to their Lordships to be a misapprehension based upon a mistaken reading of a few words which occur in that Section. The Section runs thus:

498. The amount of every bond, executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Magistrate be reduced.

Two things must be observed in relation to this section. The only bonds, "executed under this chapter" are executed by person who are accused (not convicted) persons; and the words "Whether there be an appeal on conviction or not" merely qualify or relate to the words "in any case" and only mean that all accused persons are within the section whether their case is appealable on conviction or not.

33. In *Balchand v. State of M.P.* (AIR. 1977 S.C. 366) while making reference to Rule 184 of the Defence and Internal Security of India Rules 1971, read in conjunction with Section 438 of the Code of Criminal Procedure, the Supreme Court pointed out that in that rule, provision was made for non-release of a person accused or convicted for contravention of any rule or order made under the rules, unless the prosecution was given an opportunity to oppose the application for such release and in case the contravention was of a rule or order specified in that behalf in a notified order form a reasonable ground for believing that the person concerned was not guilty of such contravention. It was then observed that those conditions provided for releasing on bail a person arrested on an accusation of having committed contravention of any rule or order made under the Rules, it must follow a fortiori that the same conditions must provide the guidelines for exercising the power to grant anticipatory bail to a person apprehending arrest on such accusation, though they would not be strictly applicable. We have extracted the observations of the Supreme Court for two reasons. One is the difference between a person accused of an offence and a person convicted and that even if Rule 184 did not apply strictly to Section 438 of the Code of Criminal Procedure, the Policy behind that Rule should have to be borne in mind by the court while exercising its power to grant anticipatory bail u/s 438. Cr.P.C.

34. A learned Single Judge of the Orissa High Court, in *Rajendra Panda and Anr. v. State of Orissa* (I (1992) CCR 958) stated that restrictions imposed by Section 37(b) (ii) of the Act apply to cases covered u/s 20(b)(i). The learned Judge observed as hereunder;

The language used in Section 37(b) is clear to the effect that offences which carry punishment of five years or more are covered by it. There is nothing in the language of the statute to infer that the sentence intended was minimum limit, and not maximum limit. The language being clear and unambiguous there is no scope for taking a different view. In that view of the matter, it would be unreasonable to accept interpretation put by learned Counsel for Petitioners. In view of clear language of Section 37(b), offences covered by Section 20(b)(i) come within the ambit of the former provision. In other words, any person who is

alleged to have committed an offence in terms of Section 20(b)(i) is not to be granted bail unless court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence, and that he is not likely to commit any offence while on bail.

35. A look at the provisions of the Act, clearly shows that under Sections 15, 16, 17, 18, 19, 21, 22, 23, 24, 25 and 27-A the minimum sentence prescribed is ten years rigorous imprisonment. Under Sections 28 and 29, which deal with punishment for attempt to commit offences and abetment and criminal conspiracy, the prescription is that such offences shall be punishable with the punishment provided for the main offence. u/s 30, if any person makes preparation to do or omits to do anything which constitutes an offence punishable under any of the provisions of Sections 15 to 25, and from the circumstances, of the case, it may be reasonably inferred, that he was determined to carry out his intention to commit the offence, but had been prevented by circumstances independent of his will, he shall be punishable with rigorous imprisonment for a term which shall not be less than one half of the maximum term. Contra distinguished Section 20 refers to punishment for contravention in relation to cannabis plant and cannabis and provides two types of punishments, one in relation to ganja or the cultivation of cannabis plant and the other relating to cannabis other than ganja. In the former event, the offence is punishable with rigorous imprisonment for a term which may extend to five years, apart from fine, while in the latter case, the offence shall be punishable with rigorous imprisonment for a term which shall not be less than 10 years but which may extend to 20 years, apart from the liability to fine prescribed therein. Under Sections 26 and 27, punishments prescribed are less than five years. It is apparent from a reading of the penal provisions that the object of the legislature was to make stringent provisions for control and regulation of operations relating to narcotic drugs and psychotropic substances. We have already extracted the object with which the amending provisions were introduced with effect from 29.5.1989. It is clear that the legislature had decided to put restrictions on grant of bail relating to offences, which are punishable with imprisonment for five years or more, contra distinguished with offences, which carry a punishment of less than five years.

36. A single judge of the Karnataka High Court, in A.V. Dharmasingh and others Vs. The State of Karnataka, ) made the following observations:

Section 37 of the Act, dealing with non-bailable offences will be applicable to the offences under the Act only if they are punishable with the imprisonment of five years or more and if an offence is punishable with imprisonment which can extend upto 5 years only, Section 37 of the Act, will not be applicable. Therefore, in such cases the accused will be entitled to be released on bail. The expression punishable for a term of imprisonment for five years or more" occurring in Clause (b) of Section 37(1) of the Act means that the offences should be punishable with minimum of 5 years or more. The words "or more" are to be

read with reference to "5 years" in their grammatical meaning. "5 years or more" mean that the basis is 5 years and "or more" is the period that has to be considered with reference to the basis of "5 years". If the intention of the Legislature was to make Section 37 of the Act applicable to the offences which are punishable even upto 5 years or less, then the legislature would not have used the expression "5 years or more". It could have simply said for any offence, it could not have qualified the words offence in Section 37 with the expression punishable for a term of imprisonment for five years or more." Therefore, the expression means that the offence must be punishable with the punishment which shall be not less than 5 years but it can be more.... Where the offence alleged against accused is punishable u/s 20 of the Act, with a term which may extend to 5 years, the provisions of Section 37 of the Act would not be attracted and the accused was entitled to be released on bail.

37. On the scope of the words, "for a term of imprisonment of five years or more" found in Section 37 of the Act. A Division Bench of this Court in Sundaresan @ Meganathan @ Mega v. State rep. by Inspector of Police etc. (1993 L.W.(CrI.)371) observed as follows:

We are unable to agree with the learned Counsel for the Petitioner that the offence alleged against the Petitioner u/s 20(b) of the NDPS Act does not come within the purview of Section 37(b) of the NDPS Act. The Petitioner is also subject to the provisions of Section 37(b) of the NDPS Act. The word "punishable" is found in both the Sections namely Section 20(b) and also Section 37(b) of the NDPS Act. As per Section 20(b) of the NDPS Act, the maximum punishable is five years and whereas as per Sec. 37(b) of the NDPS Act, the punishment is for a term of five years or more, that means that the punishment can be for a term of five years also or more. Therefore, we are of the opinion that there is no distinction with regard to applicability of Section 37(b) of the NDPS Act for the offence punishable, u/s 20(b) of the NDPS Act.

In effect the said Division Bench of this Court was unable to accept the view of the learned single judge of Karnataka High Court, A.V. Dharmasingh and others Vs. The State of Karnataka, We are in entire agreement with the view taken by the Division Bench in Sundaresan @ Meganathan @ Mega's case (1993 L.W. (CrI.) 371).

38. It will be relevant at this stage to refer to the decision of the Supreme Court in Sube Singh and Others Vs. State of Haryana and Others, wherein the meaning of the word "punishable" was considered. It was held that the word "punishable" carried a meaning "liable to be punished". The Supreme Court, after referring to Webster's Third New International Dictionary, Aiyar's Law Lexicon, Bouvier's Law Dictionary and "Corpus Juris Secundum," stated thus:

The word punishable is ordinarily defined as deserving of or capable or liable to punishment punishable within statute providing that Defendant may have ten peremptory challenges if offence charged is punishable with death or by life

imprisonment; means deserving of or liable to punishment; capable of being punished by law or right, may be punished or liable to be punished, and not must be punished..... In the absence of a definition of punishable we have referred to these for gathering the exact meaning of the word. In the sense given to the word as above, there can be no doubt that the offence of murder is punishable with death even though the punishment awarded is not death but imprisonment for life.

39. In *Subash Chand v. State of Haryana* (AIR. 1988 S.C. 584) which has been referred to and followed by the Supreme Court in *Sube Singh and Others Vs. State of Haryana and Others*, , while holding that the Petitioner therein was not entitled to the benefit of Punjab Borstal Act as he has been sentenced to imprisonment for life for the offence of murder, punishable u/s 302, I.P.C. for which the sentence of death was prescribed as an alternate, observed that one of the punishments for the offence of murder was death and therefore the offence of murder would be covered within Section 2(4)(1)(a) of the Punjab Act and to such a conviction, the Punjab Borstal Act would have no application. Under the Punjab Borstal Act "offence" stood defined in Section 2(4) to mean an offence punishable with transportation or rigorous imprisonment under the Indian Penal Code other than an offence punishable with death. After extracting the definition the Supreme Court stated as hereunder;

What is expected in the definition is an offence which is punishable with death, Section 302 of the Indian Penal Code provides:

Whoever commits murder shall be punished with death or imprisonment for life and shall also be liable to fine.

One of the punishments for the offence of murder is death and. therefore, the offence of murder would be covered within Section 2(4)(1)(a) of the Punjab Act and to such a conviction the Punjab Borstal Act would have no application. Support for such a view is available from several decisions of different High Courts. Section 562(1) of the Code of Criminal Procedure of 1898 as amended in 1923 brought in the phrase; "punishable with death or transportation for life".

The Supreme Court overrules its view in *Hava Singh Vs. State of Haryana and Another*, while distinguishing its pronouncement in *State of Andhra Pradesh Vs. Vallabhapuram Ravi*, It was further observed by the Supreme Court that A.P. Borstal Act, 1985 did not have the definition of "offence" and there was no exclusion as provided in the Punjab Act.

40. It is therefore clear that the word "punishable used in Section 37 of the Act, will include offences punishable with imprisonment of five years (inclusive) or more and only those offences for which the term of imprisonment prescribed is punishable with less than five years, can stand excluded from the purview of Section 37(b) of the Act. Therefore, a person convicted of an offence u/s 20(b)(i) cannot contend that the provisions of Section 37(b) will have to be excluded from consideration.

41. As we have stated earlier, though Section 37 apparently does not take in its fold a person convicted of an offence, however, conditions required u/s 37(b) may have to be impliedly imported to Section 36-B of the Act, so as to form the main guidelines which are to be followed while the court exercises the power of suspension and grant of bail, pending disposal of an appeal by a person convicted for an offence under the Act. This very same principle has been enunciated by three earlier Division Benches of this Court in Oliver Fernando's case (1990 L.W.(CrI.) 357) , Kantilal Jain's case (1991 L.W.(CrI.) 563) and Sundaresan @ Meganathan @ Mega's case (1993 L.W.(CrI) 371).

42. A Full Bench of the Kerala High Court had occasion to consider the scope of power of the High Court to enlarge on bail a person convicted for murder and sentenced to life pendente lite in Uthaman and Others Vs. State of Kerala, the following observations are very relevant;

We find no warrant for any dogmatic approach that when once a person accused of an offence u/s 302 of the I.P.C. has been convicted and sentenced to life imprisonment, the appellate court is not to enlarge the accused on bail pendente lite. To state the proposition in such categorical terms would be to self-impose a restriction on the exercise of power by the appellate court u/s 389 read with Section 439(1) of the Criminal Procedure Code. That will be to read into the power of the High Court a limitation not warranted by the provisions of the Criminal Procedure Code..... May be in considering the possibility of the accused jumping bail the question whether there is reasonable ground to believe that the accused had committed a serious crime is relevant. It is in that view that the High Court takes note of this circumstance u/s 439(1) of the Code. If either because the evidence is so meagre that the accused is not likely to take the risk of jumping bail anticipating conviction in appeal or there are other reasons why on the facts of a case the court could form the opinion that the accused would not jump bail if released then bail may be granted unless it be that the court may have reason to believe that the release of the accused may be of danger to others or to himself or he may cause self-effacement. In determining whether there are reasonable grounds for believing that the accused has committed an offence punishable with death or life imprisonment the court looks into materials then available to it, whether it be at the stage of investigation or at the stage trial. Such would be the case even in the appeal. Merely because the appeal is against a conviction there should not be a presumption that the accused has committed the offence as that would be to foreclose on the plea of the accused that on the materials available, there is no justification to refuse bail.

We are of the firm opinion that the legal position has been correctly spelt out by the Full Bench of the Kerala High Court, in the decision above referred to. Hence, we are not able to agree with the view taken by two learned single judges of this Court in Velu Thevar's case (1992 L.W.(CrI)187) and Nagalingam's case (1993 L.W.(CrI.) 534) , that after the stage of trial, material laid by the prosecution gets sanctified as evidence proving the commission of the offence by the

offenders, till their conviction and sentence are set aside on appeal and in such state of affairs it cannot be stated that there are reasonable grounds at the stage of consideration of suspension of sentence pending appeal, for coming to conclusion that the person is not guilty of the offence in respect of which he had been convicted and sentenced, leave alone the other ground that he was not likely to commit any offence while on bail. We quite often come across cases where convictions are rested either on no evidence or on inadmissible evidence and similar such circumstances, and if it were to be held as a rigid rule, that though the power vests in the High Court to suspend the sentence and direct enlargement of bail of person convicted for offences punishable under the Act, but still it cannot do so, merely because it will have to be held that ex-facie the judgment rendered by the trial judge raised a presumption that the accused convicted had committed the offence and therefore, it cannot be presumed that reasonable grounds existed for believing that the Appellant was not guilty of such offence and he was not likely to commit any offence while on bail, it will certainly amount to self-imposing on restrictions not warranted by law, The past history of the Appellant will of course, be relevant on the second contingency envisaged by Section 37(b). The guidelines provided u/s 37(b) of the Act will have to be imported into Section 36-B of the Act, though it does not form part of the latter section, keeping in view the object of the Act. The factual constituent in every case, will be the guiding factor for suspension of sentence and grant of bail pending appeal. A rigid formula cannot be adopted that in no case a person convicted of an offence under the Act can have his sentence suspended and consequently released on bail irrespective of facts, on presumptions that there will be no reasonable grounds to believe that he was not guilty of such offence, more so, when the presumption is rebuttable. It is not as though grant of bail is totally barred under the Act at any stage, but all that the court will have to look into will be the limitations on granting of bail in the background of the object of the Act. Even the Code of Criminal Procedure imposes fairly similar reasonable restrictions. The decisions of learned single Judges of this Court which enunciate a principle contra shall stand overruled.

43. Our answer to the question posed is that the High Court has power to suspend the sentence awarded on conviction for offences punishable under the Act, with imprisonment for five years or more in exercise of its powers u/s 389 of the Code of Criminal Procedure, but such suspension will depend upon the fact situation placed for court's scrutiny. The consequential power directing enlargement on bail on suspension, is of course a logical corollary. Section 32-A of the Act will not be applicable to the High Court and the powers of suspension conferred on the High Court and the powers of suspension conferred on the High Court under the Code of Criminal Procedure stand preserved in view of the provisions enshrined in Section 36-B of the Act. We have already stated our reasons and they require no reiteration.

44. For factual consideration, on suspension of sentence and enlargement of the

Petitioner on bail, this matter will go back to the learned single Judge. We are told that several petitions of this nature are pending disposal. All those petitions may have to be disposed of in the light of the verdict pronounced by us in this petition on the scope of the legal provisions enshrined in the Act.

45. We place on record our appreciation for valuable assistance rendered by learned Counsel Messrs.T. Sudanthiram, T.K. Sampath, N. Ganapathi, G. Alagar and Mr. B. Sriramulu, learned Public Prosecutor.